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Deborah Daniloff

Note

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by
DEBORAH DANILOFF*

In recent years, employer defamation has become a subject of legal debate.[1] Newspaper and journal articles express concern over the growing number and expanding scope of defamation suits involving employee termination.[2] The articles contend that defamation is providing an

* B.A., University of California, Irvine 1986; Member, Third Year Class.

1. *See* R. SMOLLA, LAW OF DEFAMATION 1-6 (1986):

> America has developed a new fascination with defamation. More suits are brought and American juries, the legal system's most reliable barometer of changing attitudes, have on the whole proved extremely sympathetic to plaintiffs both in terms of propensity to decide in their favor and in the size of damage awards. These changes, which have been monitored by the Libel Defense Center, indicate that the law of defamation will probably remain an area of substantial litigation activity.

See also Duffy, *Defamation and Employer Privilege,* 9 EMPLOYEE REL. L.J. 444, 444 (1984) ("[T]he employee rights explosion of the last several years has fostered new sensitivity and focused new attention on such traditional torts as defamation for remedying work-place complaints."); Note, *Potential Employer Liability for Employee References,* 21 U. RICH. L. REV. 427 (1987) (authored by Kyle E. Skopic); *Employers Face Upsurge in Suits over Defamation,* Nat'l L.J., May 4, 1987, at 1 [hereinafter *Employers Face Upsurge*]; *Fired Employees Turn the Reason for Dismissal into Legal Weapon,* Wall St. J., Oct. 2, 1986, at 33, col. 3 [hereinafter *Fired Employees*]; Annotation, *Defamation: Loss of Employer's Qualified Privilege to Publish Employee's Work Record or Qualifications,* 24 A.L.R. 4th 144 (1983).

The RESTATEMENT (SECOND) OF TORTS § 558 (1977) sets forth the elements of defamation as follows:

> To create liability for defamation there must be:
>
> (a) a false and defamatory statement concerning another;
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> (b) an unprivileged publication to a third party;
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> (c) fault amounting at least to negligence on the part of the publisher; and
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> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

See Stuempges v. Parke Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980) (elements of common-law defamation are that the statement made must (1) be communicated to someone other than plaintiff, (2) be false, and (3) tend to injure the plaintiff's reputation).

2. *See* Note, *supra* note 1, at 427; *Employers Face Upsurge, supra* note 1, at 1; *Fired Employees, supra* note 1, at 33.

alarmingly popular vehicle for disgruntled employees to obtain retribution from former employers when employment relations deteriorate.[3] Recent expansions in defamation law, such as the recognition of self-publication defamation actions, undoubtedly have fueled this trend.[4]

The increasing use of defamation in employment disputes raises two central concerns: the demise of the employer referral system and the inhibition of communications in the workplace. For instance, because of the recent popularity of defamation suits, many employers now refuse to give references[5] and attorneys are advising their employer clientele that

3. *See* Note, *supra* note 1, at 427; *Employers Face Upsurge, supra* note 1, at 1; *Fired Employees, supra* note 1, at 33.

4. Defamation requires an unprivileged publication of a false statement to a party other than the plaintiff. RESTATEMENT (SECOND) OF TORTS § 577 (1977).

Generally, there is no publication when the defendant communicates the statement only to the plaintiff. *Id.*; *see* Shoemaker v. Friedberg, 80 Cal. App. 2d 911, 916, 183 P.2d 318, 322 (1947) (when defamed person voluntarily discloses the contents of a libelous communication to others, the originator of the libel is not responsible); *see also* Merritt v. Detroit Memorial Hosp., 81 Mich. App. 279, 284-86, 265 N.W.2d 124, 126-27 (1978) (defendant is not liable if plaintiff repeats statement to third party when defendant communicates statement only to plaintiff or when the plaintiff voluntarily repeats the statement to another).

A few defamation suits, however, have prevailed without publication by the defendant. This exception, referred to as self-publication defamation, typically arises when a third party forces the plaintiff to communicate the defamatory statement. *See, e.g.*, McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 795-97, 168 Cal. Rptr. 89, 93-94 (1980) (defamation action valid when discharged deputy sheriff was under strong compulsion to reveal false termination reason to prospective employer); Colonial Stores Inc. v. Barrett, 73 Ga. App. 839, 840-41, 38 S.E.2d 306, 308 (1946) (defamation action valid when employer wrote defamatory reason for termination on wartime certificate of availability with knowledge that employee would have to show the certificate to prospective employers); Grist v. Upjohn Co., 16 Mich. App. 452, 484-86, 168 N.W.2d 389, 405-06 (1969) (defamation action valid when employer gave false reason for termination with knowledge that defamatory statement would be revealed to prospective employers); Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888 (Minn. 1986) (Minnesota Supreme Court recognized self-publication defamation when employees were compelled to repeat false reason for termination to prospective employers).

5. *See* McLanahan, *The Mechanics for Handling Employee Terminations: Releases, Post-Employment Proceedings and Related Problems,* 208 PRACTICING L. INST. ON LITIGATION & ADMIN. PRAC. SERIES 131, 153 (1982) (suggesting precautions before employee discharge); *New Twist to Defamation Suits,* A.B.A. J., May 1, 1987, at 17 (Defense lawyer Douglas Williams of Ohio states: "Before the *Equitable* case, our clients—which included both Fortune 500 corporations and small businesses—were more willing to tell the circumstances of an employee's departure, be they good or bad. Now they are more inclined to just tell the callers the employee's job title and the amount of time they worked there."); Note, *supra* note 1, at 427 ("[T]he increasing propensity of individuals and companies to sue over undesirable or inadequate references has made many employers reluctant to give out frank and detailed references.") (citing Stuempges v. Parke Davis & Co., 297 N.W.2d 252 (Minn. 1980); *Lewis,* 361 N.W.2d 875 (Minn. Ct. App. 1985), *aff'd in part and rev'd in part,* 389 N.W.2d 876 (Minn. 1986)); Comment, *Speak No Evil: The Minnesota Supreme Court Adopts Self-Publication Defamation:* Lewis v. Equitable Life Assurance Society of the United States, 71 MINN. L. REV. 1092, 1112-13 (1987) (authored by S. Olivia Mastry) ("[T]he existence of self-publication defamation may cause companies to create a policy of *never* giving information, good or bad, about employees.") (emphasis in original); *Employers Face Upsurge, supra* note 1, at 30-31

silence is the best policy regarding termination.[6] This policy predictably harms both employers and employees by restricting job mobility and by inhibiting optimal relocation of employees. Limited information about potential employees increases the possibility of an employer hiring less qualified applicants. The demise of the referral system also may undermine a more qualified employee's job prospect because an employer is more likely to hire an applicant with, rather than without, a reference, regardless of relative qualifications. An inadequate referral system also may increase employer liability for negligent hiring because of the increased risk of unknowingly hiring incompetent employees without references.[7] Finally, the threat of liability for self-publication defamation may undercut employee morale and job security since employers may find themselves compelled to terminate employees without stating their reasons.[8]

The rising number of employer defamation lawsuits also threatens open and efficient communication in the workplace. Apart from silence upon discharge, fear of liability (especially for self-publication defamation) may chill communication in other areas of workplace discourse, leaving both employers and employees at a disadvantage. Potential liability may impede the completion of progress reports and evaluations, and inhibit other day-to-day exchanges of information. For instance, a false or inaccurate progress report or evaluation conceivably could provide a basis for a self-publication defamation suit in a termination situa-

("Statistics show that employers are giving out less information. A recent survey by a Chicago-based outplacement consulting firm found that prospective employers did not check the references of nearly 75 percent of their job candidates. 'Most employers are not attempting to check a candidate's references because the former employers are not expected to cooperate . . . [t]he reasons . . . have to do with the possibility of potential litigation.'. . . Most lawyers are telling employers that they should give out only the dates of employment and the positions held when asked for a reference. . . . '[T]he safest thing is to say nothing about anybody.' ") (quoting Mr. Challenger, president of Challenger, Gray and Christmas Inc. and Mr. McDonald, attorney at Chicago's Keeck, Mahin & Cate); *Fired Employees, supra* note 1, at 33, col. 3 (" '[Employer defamation] suits are the new workhorse in termination litigation.' . . . The trend is prompting many companies to refrain from making any negative statements about former employees.") (quoting Rodney Smolla, Professor of Law at University of Arkansas).

6. *Employers Face Upsurge, supra* note 1, at 30.

7. The essence of the negligent hiring claim is an employer's failure to ascertain deficiencies in the employee's background or character that pose a potential threat of harm to clientele. *See, e.g.,* Kendall v. Gore Properties, Inc., 236 F.2d 673, 677-78 (D.C. Cir. 1956) (employer landlord held liable in wrongful death action for murder of tenant committed by employee janitor); Stewart Warner Corp. v. Burns Int'l Sec. Serv., Inc., 353 F. Supp. 1387, 1391-92 (N.D. Ill. 1973) (employer held liable for fire set by security guard).

8. Summers, *Protecting All Employees Against Unjust Dismissal,* 58 HARV. BUS. REV. 132, 133 (1980); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith,* 93 HARV. L. REV. 1816, 1835-36 (1980); Comment, *supra* note 5, at 1113 (citing The Committee on Labor and Employment Law, Ass'n of the Bar of the City of New York, *At-Will Employment and the Problem of Unjust Dismissal,* 208 PRACTICING L. INST. ON LITIGATION & ADMIN. PRAC. SERIES 174-76 (1982)).

tion since the employee could argue that he was compelled to reveal the information to an interested third party. Although this argument stretches the self-publication holdings, fear of potential liability in this situation could adversely affect open communications and, in turn, inhibit efficiency and optimal job performance.

In the face of these concerns, this Note explores alternative remedies for resolving employment defamation disputes. Resolution of the defamation problem necessarily involves a balancing of two interests: employers' free speech rights and protections under constitutional and tort law and employees' needs for adequate tort remedies when legitimately defamed.[9] The fear and censorship fostered by the increasing number of employer defamation suits indicates that the balance between employer and employee interests has been upset. The time has come to re-evaluate the current protections afforded employers in light of legitimate employee defamation concerns.

Specific problem areas that are germane to the employment situation include: eroded constitutional principles regarding free speech protection for private individuals;[10] nonuniformity, ambiguity, and overall inefficiency regarding traditional employer privileges;[11] inadequate dam-

9. *See* PROSSER AND KEETON ON TORTS 804-05 (W. Keeton 5th ed. 1984) [hereinafter KEETON] (reviewing the attempt at common law to balance the competing values of free speech and reputation); *see also* Ingber, *Rethinking Intangible Injuries: A Focus on Remedies,* 73 CALIF. L. REV. 772, 822 (1985) ("Whatever is added to the field of defamation or privacy is taken from the field of free debate. First amendment evaluations normally create a tension between public safety and free expression—both socially important values.").

10. Some authorities believe that the Supreme Court has decreased first amendment protection in private figure cases after Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1984). For example, in his dissenting opinion, Justice Brennan stated that Justices Powell and White "have cut away the protective mantle of *Gertz*" by allowing the jury to award presumed and punitive damages absent a showing of malice. *Id.* at 781 (Brennan, J., dissenting); *see also* R. SMOLLA, *supra* note 1, at 3-11 to 3-14 (asserting that the most logical reading of *Dun & Bradstreet* is that the door is open for states to return to a strict liability standard in private figure cases not involving defamatory speech relating to matters of public concern); Note, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.: *"Matters of Private Concern" Give Libel Defendants Lowered First Amendment Protection,* 35 CATH. U.L. REV. 883, 886 (1986) (authored by Patricia Thompson-Hill) (*Dun & Bradstreet* reduced protection for private defamation defendants by making the content of the speech and the status of the plaintiff determinative of first amendment protection); Note, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.: *The Supreme Court Further Muddies the Defamation Waters,* 20 LOY. L.A.L. REV. 209, 209-10 (1986) (authored by Laura Saaden) (*Dun & Bradstreet* "retreat[s] even further, leaving . . . individuals defamed by speech not involving a matter of public concern firmly entrenched in the common law bog.").

11. *See* Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight,* 71 IOWA L. REV. 226, 227 (1985) (privileges actually "encourage plaintiffs to sue for libel and provide an ironic . . . sanctuary for frivolous claims"); Watkins & Schwartz, Gertz *and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and the Conditional Privileges,* 15 TEX. TECH L. REV. 823, 884-85 (1984) (A system based solely on due care is preferable to the conditional privileges "if only on the theory that any step toward simplification is welcome in this peculiarly complex corner of the law."); Note, *Master's Defamation of His Servant,* 18

age and remedy alternatives;[12] and jury bias in favor of defamation plaintiffs.[13] This Note addresses how each of the above issues adversely affects the employer defamation crisis. Changes in, or alternative interpretations of the law for each of the listed problem areas then are proposed with the goal of reducing the fear that currently inhibits open communication in the workplace.

Section I of the Note begins by examining the historical development of defamation law and recommends adopting the *Gertz* liability rule[14] in employer defamation suits. Historically, private defamation suits were based on strict liability. Adoption of the *Gertz* liability rule, however, would reduce the harshness of common-law defamation by making proof of negligence a prerequisite to liability in employer defamation suits. This approach narrowly tailors employer defamation actions to fulfill the state interest in compensating the injured plaintiff while minimizing restrictions on free expression.

Section II then contrasts the ordinary tort definition of negligence with Professor Anderson's "enhanced or constitutional" definition of negligence.[15] Analysis and comparison of the two definitions of negligence reveal that Professor Anderson's constitutional definition provides the more effective model for resolving employment defamation cases. Anderson's proposal changes the ordinary tort definition of negligence in

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CLEV. ST. L. REV. 332, 337-39 (1969) (authored by Charles A. Caruso) (suggesting that lack of uniformity in application of the conditional privilege rules makes the privilege system cumbersome and antiquated).

12. *See* Ingber, *supra* note 9, at 824-32 (contending that general or inferred damages in defamation cases create risk of fraud and abuse due to the inadequacy of jury guidelines to determine damages); *see also* Barrett, *Declaratory Judgments for Libel: A Better Alternative,* 74 CALIF. L. REV. 847 (1986) (advocating elimination of punitive damages and legislative adoption of declaratory relief in defamation cases); Franklin, *A Declaratory Judgment Alternative to Current Libel Law,* 74 CALIF. L. REV. 809 (1986) [hereinafter Franklin, *Declaratory Judgment*] (same).

13. *See* Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal,* 18 U.S.F. L. REV. 1, 7 (1983) [hereinafter Franklin, *Good Names*]; Ingber, *supra* note 9, at 803-05, 830 (juries usually are sympathetic to the defamation plaintiff) (citing 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 15.5, at 892-95 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 37, at 208 (4th ed. 1971)); Note, *Changing Rules of Liability in Automobile Accident Litigation,* 3 LAW & CONTEMP. PROBS. 476, 477 (1936) (authored by Richard F. Nixon); *see also* R. SMOLLA, *supra* note 1, at 1-6 (commenting on the propensity of juries to sympathize with and decide in favor of the defamation plaintiff).

14. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). Throughout the remainder of the Note, the phrase "*Gertz* liability rule" refers to the United States Supreme Court's holding that the first amendment requires the private plaintiff to demonstrate some degree of fault to establish liability for a defamation claim.

15. Anderson, *Libel and Press Self Censorship,* 53 TEX. L. REV. 422 (1975). References to a constitutional definition of negligence, an enhanced definition of negligence, and the enhanced or constitutional negligence standard are derived from Anderson's proposal for a new definition of negligence in media defamation suits. See *infra* section II(C) for an analysis of Anderson's proposal.

media defamation suits to a professional negligence standard, and enhances the procedural requirements regarding the burden of proof and appellate review. Use of this proposal in the employment setting provides more thorough protections for employer speech, thereby reducing self-censorship created by the application of both strict liability and ordinary tort negligence in private defamation actions.

Section III analyzes the inefficiencies of the conditional privilege system, which protects employers' speech, and suggests replacing the privilege mechanisms with the Anderson model. This substitution would have a three-fold effect. First, the enhanced negligence model would unify and simplify employer defamation law by both eliminating the multiple definitions of malice required to show abuse of the employer's privilege and clarifying the nature and scope of the employer's protection. Second, it would reduce the employee's burden of proving malice, which is necessary to overcome the employer's privilege. Finally, while the model reduces the employee's burden, the professional negligence requirement and enhanced procedural safeguards reinforce some employer protections. This section concludes that replacing the antiquated system of privileges with the Anderson proposal provides the optimal balance between employer and employee interests.

Having explored the liability aspects of defamation, this Note then approaches the employer defamation problem from a damage perspective. Section IV highlights the inadequacies of present defamation remedies, and proposes the elimination of punitive damages and the adoption of a declaratory relief alternative.

This Note concludes that an adequate solution to the defamation trend will require a complete reconstruction of employer defamation law. Application of a negligence requirement similar to the Anderson model, elimination of the conditional privilege system, and reconstruction of defamation remedies are the optimal alterations needed to overhaul defamation law and remedy chilled communications in the workplace.

I. First Amendment Protection for Employers

For years, legal scholars have debated the appropriate level of free speech protection afforded the private individual under the first amendment.[16] The Supreme Court's latest word on the issue, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[17] failed to clarify whether the higher first amendment standards of liability set forth in *Gertz v. Robert*

16. *Compare* sources cited *supra* note 10 (lamenting the erosion of constitutional protections for private speech after *Dun & Bradstreet*) *with* sources cited *infra* note 61 (predicting the demise of strict liability and the inevitability of greater protections in private defamation actions).

17. 472 U.S. 749 (1985).

Welch, Inc.[18] applied to actions against nonmedia defendants.[19] Despite the ambiguity of the Supreme Court decisions, a compelling argument can be made that the first amendment requires application of the *Gertz* liability rule, which would repeal strict liability and inject an element of fault in employer defamation suits. Before exploring this proposal, this section examines the Supreme Court decisions defining the boundaries of the first amendment.

A. Historical Development of Defamation Law

Emphasizing the importance of protecting the individual's reputation, common-law defamation was based on strict liability.[20] Under the common-law system, states virtually had unlimited discretion over the application of the strict liability standard to defamation actions.[21] Yet, while the protection of individual reputation represented an important state interest, countervailing considerations regarding the dissemination of information prompted the establishment of privilege protections[22] and the affirmative defense of truth[23] under the common law.

These minimal safeguards, however, provided little protection to the free flow of ideas. Concern that a free society could not function effectively without a greater degree of tolerance for mistakes in the dissemination of information and ideas thus took on constitutional dimensions, eroding the states' broad discretion over defamation actions.[24] *New York Times Co. v. Sullivan*[25] initiated the Supreme Court's constriction of state defamation laws. The *Sullivan* decision established three important principles: (1) actual malice must be shown to establish liability in a defamation suit against a public official;[26] (2) fault must be established by

18. 418 U.S. 323 (1974).

19. *See* Comment, Dun & Bradstreet v. Greenmoss: *Cutting away the Protective Mantle of* Gertz, 37 HASTINGS L.J. 1171, 1195 (1986) (authored by Michael Greene) (The "*Greenmoss* decision takes defamation back into uncertainty, not forward into settled law.").

20. The common law maintained that a defendant published at his own risk. KEETON, *supra* note 9, at 804.

21. *Id.* at 805.

22. See *infra* notes 112-23 and accompanying text for a discussion of the privileges.

23. *See* KEETON, *supra* note 9, at 804. After the plaintiff established the elements of defamation, the burden shifted to the defendant to prove the truth of the statement. *See, e.g.*, Owens v. Scott Publishing Co., 46 Wash. 2d 666, 673, 284 P.2d 296, 302 (1955), *cert. denied*, 350 U.S. 968 (1956); Carey v. Hearst Publications, Inc., 19 Wash. 2d 655, 659, 143 P.2d 857, 860 (1943).

24. KEETON, *supra* note 9, at 805.

25. 376 U.S. 254 (1964).

26. *Id.* at 272-83. In the *Sullivan* case, City Commissioner Sullivan filed a libel suit against the New York Times Company for false statements referring to the plaintiff's participation in the suppression of civil rights demonstrations. The Court held that libel suits against public officials require proof of actual malice to establish liability. *Id.* at 279-80. The Court based its decision on the need to protect debate on public controversies which in turn promotes social and political changes. *Id.* at 279. Without first amendment protection for commentary

clear and convincing evidence;[27] and (3) the defamation judgment is subject to independent appellate review.[28]

Rosenbloom v. Metromedia, Inc.[29] was another watershed for the subordination of state defamation laws to first amendment concerns. *Rosenbloom* expanded the *Sullivan* protections to statements involving issues of public or general interest.[30] A plurality of the Court held that the actual malice standard, which was applied to public officials in *Sullivan,* protected any speech relating to an issue of public interest, regardless of the speaker's status.[31]

Three years later, however, in *Gertz v. Robert Welch, Inc.,*[32] the Court limited the application of the *Rosenbloom* rule in private figure cases. *Gertz* held that the state interest in protecting the private individual's reputation outweighed first amendment protections of private speech.[33] The Court reasoned that private individuals are more vulnerable to defamation injury than public figures,[34] as well as more deserving of recovery.[35] Thus, private plaintiffs were not required to prove the more exacting actual malice standard to establish liability.[36] *Gertz,* however, did create a threshold constitutional requirement for a private defamation action: the plaintiff must furnish proof of fault (whether negligence or some other degree of fault) to establish liability in all defamation cases.[37] This requirement effectively repealed the common-law

on public officials the "threat of damage suits would 'otherwise inhibit the fearless, vigorous and effective administration of policies of government.' " *Id.* at 282 (quoting Barr v. Matteo, 360 U.S. 564, 571 (1959)).

27. *Id.* at 285-86. The *Sullivan* Court held that the first amendment "demands" a "constitutional standard" of proof. *Id.* at 286. The opinion is not clear whether this standard of proof is required under all first amendment issues or whether the higher standard of proof is tied to the actual malice requirement. *See id.* at 285-86.

28. *Id.* at 284-85. When "the line between speech unconditionally guaranteed and speech which may legitimately be regulated" is questioned, the Court condoned an independent review of the entire trial record to determine if the decision comported with the principles of the first amendment. *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958)).

29. 403 U.S. 29 (1971).

30. *Id.* at 41-45.

31. *Id.* at 44.

32. 418 U.S. 323, 346 (1974).

33. *Id.* at 346-47.

34. *Id.* at 344 (Private individuals are more vulnerable to injury from defamation because public officials have greater access to channels of communication to counteract false statements.).

35. *Id.* (Private individuals are more deserving than public figures because public figures assume the risk of public criticism by voluntarily placing themselves at the forefront of public controversy.).

36. *See supra* text accompanying note 26.

37. *Gertz,* 418 U.S. at 347.

strict liability element of defamation.[38] The *Gertz* decision also abolished presumed and punitive damages absent a showing of actual malice.[39]

A number of years after *Gertz,* in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,*[40] the Supreme Court examined whether the *Gertz* requirement of actual malice to obtain presumed or punitive damages applied to a private plaintiff suing a nonmedia defendant. In *Dun & Bradstreet* a private plaintiff sued a credit reporting agency for distributing a false report that the plaintiff had filed bankruptcy. Affirming the lower court decision, the Supreme Court held that the *Gertz* damage rule, prohibiting awards of presumed or punitive damages absent a showing of actual malice, did not apply to nonmedia defendants, such as the agency.[41] The *Dun & Bradstreet* Court resurrected the *Rosenbloom* standard for determining damages in private figure cases by holding that the *Gertz* actual malice requirement for presumed damages only attached to speech of public or general interest.[42] This holding was based on the Court's view that the Constitution guarantees greater protection for speech relating to matters of public or general interest, while "[s]peech on matters of purely private concern is of less First Amendment concern."[43] The Court determined that the defamatory credit report issued by the defendant was not a matter of public interest, and thus the *Gertz* actual malice standard was not required for proof of presumed or punitive damages.[44]

B. Application of the *Gertz* Liability Rule in Employer Defamation Cases

The preceding sketch of Supreme Court holdings leaves unanswered an important question. That is, whether the *Gertz* liability rule, which requires a showing of fault, applies to private plaintiffs suing nonmedia defendants. The following section of the Note sets forth reasons why the *Gertz* liability rule can and should be maintained in employer defamation actions after *Dun & Bradstreet.* These reasons include: (1) the need to adopt an interpretation of *Dun & Bradstreet* that is consistent with the *Gertz* liability standard; (2) the current acceptance of the *Gertz* liability test in private defamation actions by states and legal scholars; and (3) the policy reasons underlying first amendment protection which require a showing of fault.

38. *Id.*
39. *Id.* at 349.
40. 472 U.S. 749, 760-61 (1985).
41. *Id.* at 761.
42. *Id.*
43. *Id.* at 759.
44. *Id.* at 761.

(1) Reconciling Gertz *and* Dun & Bradstreet

There are several possible interpretations of the status of the *Gertz* liability rule after *Dun & Bradstreet*. One interpretation limits the *Gertz* fault requirement to media defendants. Indeed, the aftermath of *Gertz* resulted in considerable debate over the validity of basing first amendment protection on media status.[45] Justice Powell, however, implicitly rejected this view in *Dun & Bradstreet* when he stated that the *Gertz* protections " 'were not justified solely by references to the interest of the press and broadcast media in immunity from liability.' "[46] Justice Powell's rejection of the media-nonmedia distinction is supported by Justice White's concurrence in *Dun & Bradstreet,*[47] and by Justice Brennan who in dissent stated that "such a distinction is irreconcilable with fundamental First Amendment principle[s]."[48]

A second interpretation of the Supreme Court decisions suggests that the public concern standard adopted by the *Dun & Bradstreet* Court applies to both the liability and damage requirements established in *Gertz*. In other words, since *Dun & Bradstreet* limited the *Gertz* actual malice requirement for damages to statements of public concern, the *Gertz* fault requirement also should be limited by the public concern standard. According to this interpretation, the Court reaffirmed a state's ability to apply strict liability in private defamation cases that involve statements outside the public's concern.[49]

If this interpretation is accurate, its application requires defining what constitutes a general or public issue. The *Gertz* opinion, however, expressly rejected this standard as ambiguous, stating that "[t]he 'public or general interest' test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of

45. *See generally* Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches,* 75 MICH. L. REV. 43, 50 (1976) (analyzing the media–nonmedia distinction); Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?,* 26 HASTINGS L.J. 639, 649 (1975) (same); Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment,* 78 NW. U.L. REV. 1212, 1269 (1983) (same); Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel,* 132 U. PA. L. REV. 1, 29-33, 90 (1983) [hereinafter Smolla, *Author Beware*] (same).

46. *Dun & Bradstreet,* 472 U.S. at 756 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974)).

47. In his concurring opinion, Justice White stated, "Wisely, in my view, Justice Powell does not rest his application of a different rule here on a distinction drawn between media and nonmedia defendants. On that issue, I agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech." *Id.* at 773 (White, J., concurring).

48. *Id.* at 781 (Brennan, J., dissenting) (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978)). Justice Brennan was joined by Justices Marshall, Blackmun, and Stevens.

49. *See* R. SMOLLA, *supra* note 1, at 3-12; *see also* Comment, *supra* note 19, at 1193 (suggesting that lower courts will likely be free to return to strict liability after *Dun & Bradstreet*).

the competing values at stake."[50] *Dun & Bradstreet* also demonstrates the inadequacy of the public interest standard. Justice Powell's opinion maintained that a credit report is not a matter of general or public interest given the report's "content, form, and context."[51] In another context or form, or given different contents, the report might be a matter of public or general interest. Thus, the public or general interest definition is infinitely variable. It may cover any type of communication given the context and circumstances. Under this vague standard, employer speech, as well as any other private speech, arguably could be a matter of "general interest."[52] For example, employer referrals may constitute communications of general interest since they promote efficient relocation of employees and safeguard against employer liability for negligent hiring. Application of the fault requirement in all defamation cases avoids the problem of drawing these distinctions.

A final interpretation of *Dun & Bradstreet* preserves the *Gertz* liability rule. One reason for preferring this interpretation is that the *Dun & Bradstreet* opinion was limited explicitly to an evaluation of the damage rule established in *Gertz*. Justice Powell carefully emphasized in the opening paragraph of his opinion that the *Gertz* rule concerning presumed and punitive damages was the *only* issue before the Court.[53] Justice Brennan's dissent also pointed out that *Dun & Bradstreet* did not "question the requirement of *Gertz* that the respondent must show fault to obtain a judgment and actual compensatory damages."[54] The Court held only that the plaintiff must demonstrate actual malice to obtain presumed and punitive damages if the speech relates to matters of general or public concern.[55] Because the opinion failed to comment on the applicable standard of liability, and because Justice Powell expressly limited the holding to a determination of the damage requirement,[56] the most logical reading of *Dun & Bradstreet* is that the *Gertz* fault requirement still stands in private defamation actions.[57]

Another argument for maintaining the *Gertz* fault requirement is that Justice Powell's rejection of the *Gertz* damage rule (that is, no pre-

50. *Gertz*, 418 U.S. at 346.

51. *Dun & Bradstreet*, 472 U.S. at 762 n.8.

52. *See* R. SMOLLA, *supra* note 1, at 3-14 ("The plurality opinion in *Dun & Bradstreet* did little to define the phrase 'matters of public concern.' ").

53. *Dun & Bradstreet*, 472 U.S. at 751.

54. *Id.* at 781 (Brennan, J., dissenting).

55. *Id.* at 761.

56. *Id.* at 751.

57. *Cf.* R. SMOLLA, *supra* note 1, at 3-12 ("The question of whether the *Gertz* liability rules are also swept away in cases not involving matters of public importance remains open. More specifically, *Dun & Bradstreet* fails to answer this question conclusively: May a state impose common law strict liability standards in cases involving private figure plaintiffs and defamatory speech not involving matters of public concern, or does the *Gertz* prohibition on liability without fault continue to apply to all private figure cases?").

sumed damages absent actual malice) neither logically supports nor compels rejection of the *Gertz* fault requirement (that is, repeal of strict liability defamation). Justice Powell based his rejection of the *Gertz* damage rule on a balancing test. He found that the state interest in protecting individual reputation in private defamation actions, via allowance of presumed damages, outweighed first amendment concerns.[58]

A similar outcome might not be forthcoming, however, if the *Gertz* fault requirement were tested under the same standard. The state interest in applying common-law strict liability in private defamation actions may not be as strong as the state interest in allowing presumed damages. Injury to reputation frequently will be difficult to quantify and thus almost impossible to prove,[59] whereas proving the existence of negligence is a routine problem in most tort cases. Absent presumed damages, many defamation victims would be precluded from recovery since proof of damage to reputation is vague at best. Absent strict liability, defamation victims will have to demonstrate lack of due care, as do other tort victims. Therefore, presumed damages provide a greater benefit to defamation victims, and thus could constitute a greater counterbalance to first amendment concerns than strict liability under the Powell balancing test. In sum, presumed damages may promote a state interest in compensating defamation victims to a greater extent than strict liability. Thus, the Powell balancing analysis regarding the need to repeal the *Gertz* damage rule in private defamation actions does not imply nor directly support a rejection of the *Gertz* fault requirement.

(2) Courts and Commentaries Retain the Gertz *Liability Rule*

General acceptance of the *Gertz* liability rule further supports its application in private defamation cases. For instance, many state courts require at least proof of negligence in all defamation actions.[60] Addition-

58. *Dun & Bradstreet*, 472 U.S. at 757.

59. *Id.* at 760. The rationale of the common-law rules has been the experience and judgment of history that " 'proof of actual damages will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.' " *Id.* (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112 (4th ed. 1971)).

60. As of 1984, many states had adopted a negligence standard of liability in private defamation actions. *See* Cohen, *Libel: State Court Approaches in Developing a Post-*Gertz *Standard of Liability*, 1 ANN. SURV. AM. L. 155, 155 (1984) ("No court has sought to impose liability in a '*Gertz*' case on any showing of fault that amounts to less than traditional negligence."); Franklin, *What Does "Negligence" Mean in Defamation Cases?*, 6 COMM/ENT L.J. 259, 260 (1983-84) [hereinafter Franklin, *Negligence*].

Jurisdictions adopting some form of negligence standard in defamation action brought by a private figure plaintiff include: Alabama (Mead Corp. v. Hicks, 448 So. 2d 308 (Ala. 1983)); Arizona (Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216 (1977)); Arkansas (Little Rock Newspapers, Inc. v. Dodrill, 281 Ark. 25, 660 S.W.2d 933 (1983)); Connecticut (Corbertt v. Register Publishing Co., 33 Conn. Supp. 4, 356 A.2d 472 (Super. Ct. 1975));

ally, legal authorities have predicted or prescribed a negligence requirement in private defamation actions following the *Gertz* decision.[61]

Delaware (Re v. Gannett, 480 A.2d 662 (Del. Super. Ct. 1984), *aff'd,* 496 A.2d 553 (Del. 1985)); District of Columbia (Phillips v. Evening Star Newspaper Co., 424 A.2d 78 (D.C. 1980), *cert. denied,* 451 U.S. 989 (1981)); Florida (Miami Herald Publishing Co. v. Ane, 458 So. 2d 239 (Fla. 1984)); Georgia (Triangle Publications, Inc. v. Chumley, 253 Ga. 179, 317 S.E.2d 534 (1984)); Hawaii (Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 543 P.2d 1356 (1975)); Illinois (Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975)); Kansas (Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975)); Kentucky (McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882 (Ky. 1981), *cert. denied,* 456 U.S. 975 (1982)); Louisiana (Wilson v. Capital City Press, 315 So. 2d 393 (La. Ct. App. 1975), *cert. denied,* 320 So. 2d 203 (La. 1982) (specifically approving decision)); Maryland (General Motors Corp. v. Piskor, 277 Md. 165, 352 A.2d 810 (1976)); Massachusetts (Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975)); Mississippi (Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980) (applying Mississippi law), *cert. denied,* 452 U.S. 962 (1981)); New Mexico (Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982)); Ohio (Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied,* 423 U.S. 883 (1975)); Oklahoma (Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976)); Oregon (Bank of Ore. v. Independent News, 65 Or. App. 29, 670 P.2d 616 (1983), *aff'd,* 298 Or. 434, 693 P.2d 35, *cert. denied,* 474 U.S. 826 (1985)); Pennsylvania (Mathis v. Philadelphia Newspapers, 455 F. Supp. 406 (E.D. Pa. 1978) (applying Pennsylvania law)); Puerto Rico (Torres-Silva v. El Mundo, 106 P.R. Dec. 415 (1977)); Rhode Island (DeCarvalho v. daSilva, 414 A.2d 806 (R.I. 1980)); Tennessee (Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978)); Texas (Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976), *cert. denied,* 429 U.S. 1123 (1977)); Utah (Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981)); Vermont (Colombo v. Times-Argus Ass'n, 135 Vt. 454, 380 A.2d 80 (1977)); Virginia (Gazette, Inc. v. Harris, 229 Va. 1, 325 S.E.2d 713 (1985)); Washington (Caruso v. Local Union No. 690, 100 Wash. 2d 343, 670 P.2d 240 (1983), *cert. denied,* 108 S. Ct. 67 (1987)); West Virginia (Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70 (W. Va. 1983)); Wisconsin (Denny v. Mertz, 106 Wis. 2d 636, 318 N.W.2d 141, *cert. denied,* 459 U.S. 883 (1982)); Wyoming (Adams v. Frontier Broadcasting Co., 555 P.2d 556 (Wyo. 1976)).

61. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer,* 61 VA. L. REV. 1349, 1417 (1975) ("*Gertz* will almost surely be applied to defamation suits by private individuals against non-media defendants."); *see also id.* at 1418 ("It would seem that retaining strict liability for defamation by individuals has little in logic or policy to commend it.").

> In Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 70 (1971), Justice Harlan stated,
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> [I]t does no violence . . . to the value of freedom of speech . . . to impose a duty of reasonable care upon those who would exercise these freedoms. I do not think it can be gainsaid that the States have a substantial interest in encouraging speakers to carefully seek the truth before they communicate, as well as in compensating persons actually harmed by false descriptions of their personal behavior. Additionally, the burden of acting reasonably in taking action that may produce adverse consequences for others is one generally placed upon all in our society. Thus, history itself belies the argument that a speaker must somehow be freed of the ordinary constraints of acting with reasonable care in order to contribute to the public good . . . .

Cf. KEETON, *supra* note 9, at 808 (Keeton argues that the *Gertz* fault standard does not necessarily extend to communications between private individuals, but notes that the "American Law Institute has predicted that state law will require as a prerequisite to recovery in any case of defamation a showing of at least negligence with respect to truth or falsity and that such should be the law."); R. SMOLLA, *supra* note 1, § 3.01[4] (*Dun & Bradstreet* is subject to the interpretation that none of the first amendment fault restrictions of *Gertz* are operable when

Finally, the *Second Restatement of Torts* adopts a definition of defamation that requires negligence to establish liability.[62]

(3) Public Policy Favors Adoption of Gertz *Fault Requirements*

Policy reasons underlying first amendment protection reinforce the need for the application of the *Gertz* liability rule in employer defamation suits. While first amendment principles generally are associated with public discourse,[63] the policy reasons that support the protection of public discourse are equally applicable to private speech. In his *Dun & Bradstreet* dissent, Justice Brennan correctly pointed out that speech that is "purely a matter of private discourse . . . would fall well within the range of valuable expression for which the First Amendment demands protection."[64] Justice Brennan's position advocating the protection of private speech is consistent with the goals underlying the first amendment. These goals or policies include: fostering debate on public or general issues to bring about political, economic, and social change;[65] promoting of optimal decisionmaking;[66] and enhancing personal liberty.[67]

Even if one accepted the notion that public speech merits greater protection than private speech, private speech is not of such lesser importance as to justify removal of all first amendment protection. *Thornhill v. Alabama*[68] exemplifies the idea that both public and private speech can effect political, economic, and social change. *Thornhill* held that debates regarding employee hour, wage, and working conditions were important parts of public discourse and deserved constitutional protection.[69] The Court found "force [in] the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions of industry is indispensable to the effective and intelligent use of processes of government to shape the destiny of modern industrial society."[70]

Admittedly, *Thornhill* focused on workplace speech that was of public concern rather than strictly private speech between employers and

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the plaintiff is a private figure and the statement does not concern matters of public interest. If we follow this interpretation, states may return to the common-law liability standards regarding private individuals. There is danger in this interpretation.).

62. *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977). For the text of § 558, see *supra* note 1.

63. *See supra* text accompanying note 43.

64. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 791 (1984) (Brennan, J., dissenting).

65. Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

66. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

67. Shiffrin, *supra* note 45, at 1239-40.

68. 310 U.S. 88 (1940).

69. *Id.* at 102-03.

70. *Id.* at 103.

employees regarding termination and referrals. The *Thornhill* opinion, however, suggests that daily economic and social discussion, including debate in the workplace, contributes to political and economic decisionmaking that may have repercussions on others within the community. In addition, such debate may shape and develop national policies.

A second policy reason to expand first amendment protection to private speech is that optimal decisionmaking depends on the free exchange of ideas.[71] That is, free exchange of information regarding employee performance promotes efficiency in the workplace and optimal relocation of employees. For instance, freeing employers from the fear of unwarranted, excessive liability promotes better relationships between employers and employees. Employers will give accurate, uninhibited evaluations to their present employees, which will help the employees decide whether to improve their job performance to meet their employer's expectations and demands, or to seek employment with a more compatible employer.

Additionally, free expression of ideas, regardless of its effects on optimal decisionmaking, is valuable in and of itself because it contributes to a healthy, pleasant work environment.[72] The ability to express opinions without fear of liability promotes a sense of self-fulfillment and individuality that also improves work relations.[73]

In sum, greater first amendment protection for employer speech promotes the social policy of efficient and optimal decisionmaking in the workplace. Also, private speech in general is valuable as an extension of personal identity and liberty. Removal of all constitutional protection of private speech and the resurrection of common-law strict liability in private figure cases defeats both policies. At the very least, the promotion of these two goals deserves a safeguard against the unnecessarily chilling effect of strict liability—the adoption of the *Gertz* liability rule in employer defamation cases.

A final policy reason for adopting the *Gertz* liability rule is the lack of a constitutional basis for distinguishing between public and private speech. Since the literal language of the first amendment fails to differen-

71. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.").

72. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (freedom of speech is valued as both a means and an end), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

73. *See* Shiffrin, *supra* note 45, at 1239 ("As long as speech represents the freely-chosen expression of the speaker while depending for its power on the free acceptance of the listener, freedom of speech represents a charter of liberty from noncoercive action.") (citing Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 7 (1976)) (emphasis deleted).

tiate the types of speech that fall within its protection,[74] why should the employer be denied the minimal protection provided by the *Gertz* liability rule? "The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression."[75] "[T]he First Amendment requires significant protection from defamation law's chill for a range of expression far broader than simply speech about pure political issues."[76]

Recognition of the *Gertz* liability rule is the first step toward resolving the employer defamation problem. Adopting this aspect of the *Gertz* holding would encourage employers to use reasonable care in their speech, and to protect themselves by keeping accurate records and conducting thorough investigations. Employers would gain a uniform level of protection that insures against liability absent negligence or some greater degree of fault. Finally, foreclosing common-law strict liability would inhibit the success of some defamation suits. This, in turn, would alleviate the fear generated by increasing employer liability and free up workplace communications.

II. An Enhanced Definition of Negligence

A. Ordinary Negligence Standard

Many states accept negligence as a standard of liability for private defamation suits.[77] Although requiring proof of negligence is a barrier to recovery, it does not appear to provide enough protection to curb the detrimental trend of litigation that threatens both the employer referral system and open communication in the workplace. Employer defamation suits continue to escalate[78] despite general acceptance of a negligence standard of liability. Thus, ordinary tort negligence may not be an adequate safeguard of employer speech.

B. Actual Malice Standard

Requiring actual malice or gross irresponsibility to establish liability in private defamation actions is one solution to the inadequacy of an ordinary negligence requirement. In fact, a few states already have adopted these more exacting standards.[79] While adopting an actual malice or

74. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

75. Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 905 (1971) (Douglas, J., dissenting from denial of certiorari).

76. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749, 777 (1984) (Brennan, J., dissenting).

77. *See supra* note 60.

78. *See* sources cited *supra* note 1.

79. States using the actual malice test for private figure cases involving speech of public

gross irresponsibility standard would enhance employer protections, the excess burden on defamed employees is unwarranted. The employer who fails to use due care in his speech, who is in fact at fault when he injures the employee's reputation, will not be liable unless the employee can demonstrate the higher standard of fault. When the employee clearly establishes lack of due care by the employer, and is denied recovery due to either the actual malice or gross irresponsibility standard, the employee's injury subsidizes the employer's free speech rights. Furthermore, when lack of due care is tolerated in the employer's speech, the goal of maintaining an efficient and healthy work environment is not advanced.

C. Anderson's Enhanced Negligence Standard for Media Defendants

Professor Anderson's proposal for a constitutional or enhanced negligence standard in media cases[80] provides a useful model for negligence in the employment situation. Anderson's proposal lies between the ordinary tort negligence and the stringent actual malice standards of fault discussed above. Anderson's enhanced negligence standard requires the media defendant to act in accordance with the standards espoused by the professional community rather than the ordinary person.[81] Anderson contends that the flexible and sometimes arbitrary nature of ordinary tort negligence is inadequate when public policy supports greater protection of free expression. He asserts that while ordinary tort negligence represents a very flexible mechanism for obtaining judgments, "negligence under *Gertz* serves an entirely different purpose—the preservation of a minimum area of 'breathing space' for the press—which it attempts to accomplish by freeing publishers and broadcasters from liability for innocent misstatements."[82] Anderson suggests that ordinary negligence is inadequate to prevent unnecessary self-censorship because "[n]o one with the slightest appreciation for the myriad uncertainties of common law

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or general interest include: Alaska (Gay v. Williams, 486 F. Supp. 12 (D. Alaska 1979) (applying Alaska law)); Colorado (Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103 (Colo. 1982)); Indiana (Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied,* 424 U.S. 913 (1976)); Michigan (Dienes v. Associated Newspapers, Inc., 137 Mich. App. 272, 358 N.W.2d 562 (1984)).

New York applies a gross irresponsibility standard, which is defined as acting without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties. New York Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975).

80. Anderson, *supra* note 15, at 422. *See generally* Franklin, *Negligence, supra* note 60, at 259 (explaining Anderson's view and expanding on the meaning of a constitutional definition of negligence in defamation cases against media defendants).

81. Anderson, *supra* note 15, at 466.

82. *Id.* at 460.

negligence would rely on the belief that reasonable care will preclude an adverse verdict."[83]

Anderson also proposes applying the *Sullivan* clear and convincing evidence test to establish the professional negligence requirement.[84] Because *New York Times Co. v. Sullivan* established an actual malice standard in conjunction with the clear and convincing evidence test for defamation cases involving public officials,[85] commentators[86] and one court[87] maintain that the higher burden of proof is linked to the actual malice standard. The Supreme Court, however, has yet to consider the scope of the convincing clarity requirement.[88] Anderson claims that, given the vulnerability of the media to defamation actions and the national importance placed on free and open debate in the press, the clear and convincing evidence test should be applied in private actions against media defendants.[89]

Finally, Anderson supports the use of the *Sullivan* procedural requirement for independent appellate court review of jury verdicts.[90] He contends that a common-law application of negligence provides inadequate appellate review since appellate courts typically do not overturn questions of fact.[91] Free speech policies are essential in media defamation cases, however, and the appellate court should have greater reviewing power.[92] Independent review would protect against jury verdicts biased against unpopular speech.[93]

D. Applying Anderson's Proposal to Employer Defamation Actions

Although Anderson's proposals focus on media defendants, his arguments provide appropriate remedies for the current employment defamation problem. For instance, a professional negligence standard would require that the employer "exercise the skill and knowledge normally exercised by members of his profession."[94] What is reasonable for the ordinary person is not always reasonable for the employer in a termina-

83. *Id.*

84. *Id.* at 467-68.

85. New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964); *see supra* text accompanying notes 26-27.

86. *See, e.g.*, R. SMOLLA, *supra* note 1, at 3-21; RESTATEMENT (SECOND) OF TORTS § 580B comment j (1977).

87. Jacron Sales Co. v. Sindorf, 276 Md. 580, 597, 350 A.2d 688, 698 (1976).

88. Anderson, *supra* note 15, at 467-68. *But see* Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490, 1512 (D.D.C. 1987) (rejecting convincing clarity standard as too burdensome for private figure plaintiff on issue of falsity).

89. Anderson, *supra* note 15, at 467-68.

90. *Id.*; *see supra* text accompanying note 28.

91. Anderson, *supra* note 15, at 468.

92. *Id.*

93. *Id.* at 467-68.

94. *Id.* at 466.

tion situation. Employers face a unique set of contingencies that many people would not consider in their evaluation of what is reasonable. Therefore, employer speech should be judged in light of the profession involved, the standards within that profession, the need for quick or decisive action in termination decisions, the business sense and propriety involved in the employer's speech, and a myriad of other factors that are unique to the employment situation. To allow juries to decide what is reasonable based on an ordinary negligence definition imposes a uniform standard on all defendants that is unrealistic given the variety of professions, circumstances, and resources available to different employers. A professional negligence standard reassures the employer that she will not be held liable for actions that are reasonable within the custom and rules of the particular job. Knowing this, the employer can tailor her speech to what is reasonable and acceptable in her profession, rather than adopting a no reference or no reason for termination policy.

The fact that constitutional aspects of defamation are incompatible with traditional tort law negligence definitions provides another reason to apply Anderson's proposal for an enhanced definition of negligence in defamation cases. Anderson asserts that the ordinary tort negligence standard "is inappropriate, confusing or incomprehensible when applied to communications torts."[95] Ordinary tort negligence is purposefully malleable in order to allow a determination of liability in a variety of fact situations. Judgments rendered under this standard neither encompass nor preserve a minimum area of breathing space for first amendment rights. Under an ordinary negligence standard, an employer who exercises reasonable care in her speech still may justifiably fear liability. First amendment concerns require more refined standards for determining reasonableness in order to insure that the free exchange of ideas and opinions is not stifled by tort law. The professional negligence standard allows this type of enhanced critique.

Anderson's second proposal—applying a clear and convincing evidence test—also is appropriate in the employer defamation situation. The clear and convincing evidence test would increase the plaintiff's burden of proof beyond the current preponderance of the evidence requirement. Clear and convincing evidence is defined as "clear, explicit and unequivocal" or as "sufficiently strong to command the unhesitating assent of every reasonable mind."[96] The distinction between the two standards has been summarized as follows: "preponderance calls for probability, while clear and convincing proof demands *high*

95. *Id.* at 480.

96. *In re* Jost, 117 Cal. App. 2d 379, 383, 256 P.2d 71, 74 (1953) (quoting Sheehan v. Sullivan, 126 Cal. 189, 193, 58 P. 543, 544 (1899)).

probability."[97] Thus, evidence demonstrating a high probability that the employer acted unreasonably would be necessary to establish liability.

Application of the convincing clarity test would have a positive effect on employer defamation cases by insuring that the plaintiff's claim has merit. Frivolous defamation suits aimed at increasing settlement awards most likely will decrease with the application of the higher burden of proof. Additionally, enhanced scrutiny of the evidence under the clear and convincing test increases the likelihood that the court will in fact apply the professional negligence standard rather than accepting vague assertions of due care under the ordinary negligence standard.

Rosenbloom v. Metromedia, Inc.,[98] further supports application of the convincing clarity test when first amendment issues are at stake. The *Rosenbloom* plurality noted that an erroneous verdict in an ordinary civil suit is no more serious for one litigant than it is for another.[99] It recognized, however, that in libel cases "an erroneous verdict for the plaintiff [is] most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such an error . . . would create a strong impetus toward self-censorship."[100] In other words, an erroneous verdict in an ordinary civil suit is not as serious as an erroneous verdict in a libel suit because the latter tends to chill the free speech of the class of persons who are situated similarly to the individual defendant. Thus, the *Rosenbloom* Court used the higher standard of proof to insure that juries do not lightly impose liability when such a verdict would tend to inhibit open discourse. Accordingly, the Court criticized the use of the preponderance of the evidence standard in defamation actions.[101]

New York Times Co. v. Sullivan also supports the application of the clear and convincing test.[102] While the *Sullivan* Court applied the higher burden of proof in defamation suits involving a public official, the Court did not specifically limit the clear and convincing test to the public official scenario.[103] In fact, the reasons for imposing a heavier burden of proof in a *Sullivan* defamation suit are equally valid in the private figure case involving a nonmedia defendant. The employer, like the media defendant in a *Sullivan* scenario, is more likely to inhibit all potentially dangerous speech if negligence can be demonstrated easily.[104] The clear and convincing evidence test precludes the low threshold of proof re-

97. B. WITKIN, CALIFORNIA EVIDENCE § 160, at 137 (3d ed. 1986).

98. 403 U.S. 29 (1971).

99. *Id.* at 50.

100. *Id.*

101. *Id.*

102. New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).

103. *Id.*

104. *See id.* at 300, 304 (arguing that if mere strong words about public issues create potential liability, public debate will diminish greatly).

quired under the preponderance of evidence test, thus reducing the potential for the mistaken liability verdicts that chill open communication.

Anderson's third proposal—to require independent appellate review—also is useful in employer defamation cases. Anderson contends that independent review protects media defendants from jury verdicts biased against unpopular speech.[105] A similar analysis applies in the employment situation. Independent review counterbalances preconceived notions that juries may have about employers. Jury sympathy is likely to lie with the dismissed employee, while the employer is perceived as the "bad guy."[106] Given the current employee rights trend,[107] such a perception is conceivable. Therefore, review of jury verdicts could provide some protection against jury bias.

Juries have been considered particularly suited for determining negligence. As a result, appellate courts are hesitant to question a jury's determination of facts.[108] When constitutional principles are at issue, however, traditional rules regarding the scope of appellate review are inappropriate.[109] For example, the *Sullivan* Court held that independent appellate review was necessary to insure that the reckless disregard standard would be applied constitutionally.[110] The need for appellate review is just as compelling in the private defamation scenario because there is a

105. Anderson, *supra* note 15, at 467-68.

106. *See* sources cited *supra* note 13 (describing jury tendency to favor defamation plaintiffs).

107. For example, at-will employment contracts have come under attack in recent years as a result of growing awareness and concern for the employee's right to his job. *See* Editorial, *Employment At-Will: An Idea Whose Time is Done?,* 9 EMPLOYEE REL. L.J. 1, 1-3 (1983); Strickler, *Limitations on Employer's Rights to Discipline and Discharge Employees,* 9 EMPLOYEE REL. L.J. 70, 76 (1983); Note, *Employment At-Will: Emerging Protections for the Employee,* 22 WASHBURN L.J. 491, 491-93 (1983) (authored by Gary L. Brawn & M. Kathryn Webb).

Employee rights also are manifest in equal protection issues through legislative enactments, such as the Pregnancy Discrimination Act of 1978, § 701(k), 42 U.S.C. § 2000e(k) (1978). *See* Mass, *The Pregnancy Discrimination Act: Protecting Men from Pregnancy Based Discrimination,* 9 EMPLOYEE REL. L.J. 240 (1983).

The Supreme Court has upheld the right of an employee to refuse to perform hazardous work by liberally construing the Occupational Safety and Health Act of 1970, § 11(c)(1), 29 U.S.C. § 660(c)(1) (1986). Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980); Allen & Linenberger, *The Employee's Right to Refuse Hazardous Work,* 9 EMPLOYEE REL. L.J. 251, 256 (1983).

Experiments with peer review systems have been conducted in order to promote participatory management by employees and utilize an alternative dispute mechanism to resolve grievances. Coombe, *Peer Review: The Emerging Successful Application,* 9 EMPLOYEE REL. L.J. 659, 659-70 (1984).

108. Appellate courts rarely overturn a jury's finding of negligence. *See* Franklin, *Negligence, supra* note 60, at 273; *see also* LDRC Bull. No. 6, May 1982, at 35, 42 (demonstrating plaintiffs' success on appeal in defamation cases).

109. Anderson, *supra* note 15, at 468.

110. New York Times Co. v. Sullivan, 376 U.S. 254, 284-85 (1964).

similar likelihood of an unconstitutional application of the *Gertz* liability standard. In fact, negligence may be less easily distinguishable from innocent conduct than recklessness, and thus the greater need for review in a *Gertz* scenario.[111]

In sum, adopting Anderson's model in the employment field has several advantages over a simple negligence requirement. The model tailors the negligence requirement to the type of speech involved by invoking a professional definition of negligence rather than adopting the ambiguous and malleable due care standard of tort law. A professional negligence standard protects against broad generalities regarding speech in the employment setting that would unnecessarily chill open communication.

The procedural requirements of independent appellate review and clear and convincing evidence provide added assurance that the employee's claim has merit and that the employer's false statement is unreasonable according to the profession's standards. Independent review enables appellate courts to reverse decisions that are inconsistent with the higher constitutional standards, and to scrutinize jury verdicts for bias, thereby maintaining uniformity and certainty within constitutional law.

Adoption of Anderson's proposal in the employment setting, however, may be problematic if state qualified privilege rules conflict or overlap with an enhanced negligence requirement. The following section of this Note examines the inadequacies of the conditional privilege and recommends replacing the present system with the enhanced negligence standard.

III. Substituting the Enhanced Negligence Standard for the Qualified Privilege

A. The Privilege to Defame

Before analyzing the inadequacies of the privilege system, an overview of the development and scope of privilege rules is in order. Prior to the advent of first amendment protection, the common law reflected the idea that, in order to encourage free communication about important matters, the law must recognize exceptions to strict liability defamation.[112] The *First Restatement of Torts* justified the idea of a privilege to defame by observing:

> Were such protection not given, true information which should be given or received would not be communicated through fear of the persons capable of giving it that they would be held liable in an action of

111. Anderson, *supra* note 15, at 468.

112. KEETON, *supra* note 9, at 824-42.

defamation unless they could meet the heavy burden of satisfying a jury that their statements were true.[113]

Today, absolute and qualified privileges protect speech in areas in which uncensored expression is an important public policy. The absolute privilege[114] provides complete immunity based upon the status of the actor.[115] The qualified or conditional privilege shields speech when public policy justifies enhanced protection, but provides protection only as long as the privilege is not abused.[116]

The conditional privilege protects employer's speech. The common interest doctrine is the public policy that justifies application of the qualified privilege in the employment scenario.[117] It provides protection when the employer and the recipient of the employer's speech have a common interest in the communication. The doctrine generally covers both employer referrals and references and also extends to the self-publication scenario.[118] Thus, the employer loses the protection of the qualified privilege if: (1) he lacks belief or reasonable grounds for belief in the defamatory matter;[119] (2) there is excessive publication;[120] (3) the false statement is not reasonably necessary to accomplish the purpose for which it was given;[121] or (4) the statement is made with actual malice,[122] or common-law malice.[123]

Despite these apparently clear rules regarding the qualified privilege, courts have struggled nonetheless with defining the boundaries of the privilege's protections. For example, in *Stefania v. McNiff,* the employer posted embarrassing statements about the plaintiff where other employees could see them.[124] The court held that the plaintiff's fellow employ-

113. RESTATEMENT (FIRST) OF TORTS ch. 25, topic 3, scope note (1938).

114. RESTATEMENT (SECOND) OF TORTS §§ 585-592A (1977). Absolute privileges include: consent to publication; statements made in judicial or legislative proceedings; statements made by public officials in the performance of their duties; statements between husband and wife; and statements whose publication is required by law. *Id.*

115. *Id.* § 585 introductory note, at 243.

116. *Id.* at 245.

117. KEETON, *supra* note 9, at 828-30.

118. *Id.*

119. RESTATEMENT (FIRST) OF TORTS §§ 600-01 (1938). *But see* RESTATEMENT (SECOND) OF TORTS § 600 (1977). The Second Restatement changes the definition of abuse to actual malice and adopts the higher standard as a result of the *Gertz* decision requiring negligence in all defamation cases. Because of the additional element of fault, the second Restatement asserts that negligence is no longer sufficient to amount to an abuse of the conditional privilege. For an example of a decision that adopts the second Restatement approach, see *infra* note 136. *See also* Watkins & Schwartz, *supra* note 11, at 881 (discussing the requirements to overcome a conditional privilege in light of *Gertz*).

120. RESTATEMENT (SECOND) OF TORTS § 604.

121. *Id.* § 605.

122. *Id.* § 600.

123. *See infra* note 134 and accompanying text (defining common-law malice).

124. 49 Misc. 2d 480, 481, 267 N.Y.S.2d 854, 855-56 (N.Y. Sup. Ct. 1966).

ees did not have a legitimate interest in the faults of the plaintiff, and denied the employer's privilege under the common interest doctrine.[125] Conversely, the court in *Combes v. Montgomery Ward* held that the employer did not forfeit his privilege when fellow employees of the plaintiff learned of the false statements through the employer.[126] Similarly, in *Sokolay v. Edlin,* the employer retained the qualified privilege when he verbally accused the plaintiff of illegal acts in front of a part-time custodian.[127] The *Sokolay* court was satisfied that, as an employee on the payroll, the custodian had sufficient interest in the communication to uphold the privilege.[128]

The courts' various interpretations of the scope of the employer's qualified privilege pursuant to the common interest doctrine demonstrate its uneven application. Although designed to provide security for employer speech in certain circumstances, the qualified privilege fails to insure consistent and predictable boundaries of protection.

As noted above, an employer loses the protection of the qualified privilege when the statement is made with actual or common-law malice.[129] A further problem with the qualified privilege system stems from the multiple definitions of malice used to defeat the privilege.[130] These multiple definitions include: legal malice or malice implied from any unprivileged statement,[131] common-law malice, which focuses on the defendant's evil state of mind, such as ill will or spite,[132] and actual malice or knowing or reckless disregard for the truth, as described by the *Sullivan* Court.[133]

In addition to ambiguities created by multiple definitions of malice, the individual concepts themselves are unclear. For example, the common-law malice requirements of ill will or spite are vague and relative.[134]

125. *Id.* at 484, 267 N.Y.S.2d at 859.

126. 119 Utah 407, 413, 228 P.2d 272, 276 (1951).

127. 65 N.J. Super. 112, 124, 167 A.2d 211, 218 (N.J. Super. Ct. App. Div. 1961).

128. *Id.* at 125, 167 A.2d at 218.

129. *See supra* note 123 and accompanying text.

130. Dean Prosser wrote that the word "malice" has "plagued the law of defamation from the beginning" and is a "meaningless and quite unsatisfactory term." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 115, at 794-95 (4th ed. 1971). Professor Eldredge agrees that "the slipperiness of the word 'malice' in defamation law [prompted] The American Law Institute [to eliminate] it in the first Restatement." L. ELDREDGE, THE LAW OF DEFAMATION § 93, at 509 (1978).

131. KEETON, *supra* note 9, at 833-34. Legal malice merely was a disguised form of strict liability that is no longer used in modern defamation law. *Id.*

132. *See, e.g.,* Hardee v. North Carolina Allstate Serv., Inc., 537 F.2d 1255, 1259-60 (4th Cir. 1976); Arsenault v. Allegheny Airlines, Inc., 485 F. Supp. 1373, 1379-80 (D. Mass.), *aff'd mem.* 636 F.2d 1199 (1st Cir. 1980), *cert. denied,* 454 U.S. 821 (1981).

133. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964); *see also* RESTATEMENT (SECOND) OF TORTS § 600 (1977) (providing an actual malice standard to overcome the conditional privilege).

134. *See* Note, *"Actual Malice" and the Standard of Proof in Defamation Cases in Califor-*

For instance, what degree of spite satisfies the abuse requirement? Dislike? Loathing? The subjective nature of malice also makes it very difficult to prove or disprove. How is a jury to decide whether ill will or spite existed in the mind of the employer at the time the statement was made or whether his dislike of an employee was completely unrelated to termination? Additionally, if first amendment policies promote the opportunity for society to choose knowingly among competing ideas, then the motive of the speaker should not be as important as the falsity of the statement.[135] Contrary to this policy, the common law emphasizes the motive aspect of the defamation action.

Finally, there is considerable overlap in the type of malice required to overcome the qualified privilege and the malice required for punitive damages. In situations in which a qualified privilege arises and punitive damages are at issue, there is bound to be confusion over the proper application of the various levels of malice. For instance, the jury may receive two sets of malice instructions, common-law malice to overcome the privilege and actual malice to establish punitive damages. This unnecessary use of separate requirements undoubtedly works against all parties by increasing the difficulty, time, and cost of determining the various levels of intent. Additionally, mistakes are more likely to occur, requiring appellate review of trial court malice instructions.

In sum, the privilege system is neither an efficient nor adequate solution to defamation cases. Because it is confusing and complex, the privilege system fails to establish uniform guidelines by which employers can pattern their activities. The lack of concrete definition makes the privilege system vulnerable to manipulation and abuse. Finally, the system fails to work efficiently, increasing the time and cost of establishing various level of abuses, and augmenting the probability of mistake.

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nia: A Proposal for a Single Constitutional Standard, 16 SW. U.L. REV. 577, 589 (1986) (authored by Michael B. Farber) (arguing that " 'malice' [is] a term of art in defamation law with multiple and shifting meanings"). The following cases attach varying definitions to the term "malice," thus demonstrating the inherent vagueness of the term: Quinones v. United States, 492 F.2d 1269, 1275 (3d Cir. 1974) (wrongful act done intentionally without just cause or excuse); Time, Inc. v. Ragano, 427 F.2d 219, 221 (5th Cir. 1970) (false disregard for the truth); Goforth v. Avemco Life Ins. Co., 368 F.2d 25, 31 (4th Cir. 1966) (bad faith); Hollander v. Pan Am. World Airways, Inc., 382 F. Supp. 96, 101-02 (D. Md. 1973) (use of unnecessarily abusive language, or other circumstances that would support a conclusion that the defendant acted in an ill-tempered manner or was motivated by ill will); Jiminez v. Maritime Overseas Corp., 360 F. Supp. 142, 146 (S.D.N.Y. 1973) ("gross disregard" for rights of injured party); Brewster v. Boston Herald-Traveler Corp., 188 F. Supp. 565, 569 (D. Mass. 1960) ("disinterested malevolence" or "senseless spite" and "desire to inflict pain . . . for the sake of making somebody else squirm"); Rollenghager v. City of Orange, 116 Cal. App. 3d 414, 422-23, 172 Cal. Rptr. 49, 53-54 (1981) (hatred or ill will toward plaintiff).

135. *See* Smolla, *Author Beware, supra* note 45, at 78-81.

B. Alternatives to the Privilege System

(1) Ordinary Negligence

Replacing the qualified privilege system with a judicially mandated negligence standard of liability is the simplest method to protect the employer without unduly burdening the plaintiff or confusing the jury with malice requirements. Adopting an ordinary negligence requirement in all defamation cases would abrogate the qualified privilege in many instances. For example, a uniform negligence requirement makes the qualified privilege obsolete when the state maintains that lack of due care forecloses the privilege.[136] In this situation, the negligence requirement absorbs the privilege rules.

Some states, however, may adopt a dual system of defamation that requires negligence to establish liability and some form of malice to overcome the qualified privilege.[137] Under this system, once the plaintiff demonstrates all the elements of defamation, including negligence, he must overcome the privilege. The state may require the plaintiff to show actual malice, common-law malice, or both to foreclose the privilege.[138]

Requiring the plaintiff to demonstrate negligence and to overcome the privilege with a showing of malice, however, places too great a burden on the defamed employee. For example, if state law requires actual malice to overcome the qualified privilege, the employer who negligently provides a false reference or false termination reason is protected unless the employee can demonstrate the higher degree of intent. Clearly, employers' free speech interests are protected in this instance. Yet, the plaintiff subsidizes this interest as the uncompensated victim of a defamatory statement, even though the employer failed to use due care. This result is unfair and unwarranted since the employer is at fault in this

136. Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 600, 350 A.2d 688, 699-700 (1976). The Maryland Court of Appeals held that constitutional and state common-law defamation required negligence on the part of media and nonmedia defendants. *Id.* at 594, 350 A.2d at 696. The court noted that adoption of the negligence standard obviated the need for the privilege if negligence alone could defeat the privilege. As a result, the state adopted an actual malice standard, similar to that in *New York Times,* to overcome the qualified privilege. *Id.* at 600, 350 A.2d at 699.

As one commentator noted:

> A state may choose a due care standard satisfying *Gertz* and apply this to all defamations whether qualifiedly privileged or not. This due care standard would absorb the common law privileges and there would not be a distinction made between qualifiedly privileged and unprivileged communications. All private plaintiffs would have to show the same level of lack of due care to sustain a claim for defamation.

Comment, *The Constitutional Fault Test of* Gertz v. Robert Welch, Inc. *and the Continued Viability of the Common Law Privileges in the Law of Defamation,* 20 ARIZ. L. REV. 799, 820 (1978) (authored by Richard L. Barnes).

137. *Jacron Sales,* 276 Md. at 598, 350 A.2d at 699; Comment, *supra* note 136, at 820.

138. Comment, *supra* note 136, at 820; *see also* Watkins & Schwartz, *supra* note 11, at 881 (listing the alternative effects the *Gertz* fault requirement can have on state privilege laws).

situation. First amendment considerations do not condone free speech at all costs.[139]

Alternatively, states may require common-law malice in order to overcome the privilege. In this situation, the plaintiff must show negligence in addition to demonstrating the employer's ill will or spite. This method creates a two-tiered test that forces the jury to look first at due care, then at motive. All of the problems inherent in the common-law malice standard, such as the ambiguity of the terms "ill will" or "spite" and the subjective nature of malice, in addition to the extra burden of proving negligence, make this option awkward and difficult.[140]

Application of a negligence standard of liability and repeal of the privilege system provide a better alternative. This alternative not only insures minimum protection for the innocent employer without foreclosing recovery when fault exists, but also simplifies defamation cases by eliminating the confusing malice requirements. Repeal of the qualified privilege protections alone, however, could adversely affect already chilled workplace communications by decreasing employer protections in some instances. Employers who were accustomed to an actual malice or common-law malice standard will find an ordinary negligence standard an unwelcome change.

(2) The Enhanced Negligence Standard

Anderson's enhanced or constitutional definition of negligence presents an alternative to both ordinary negligence and the actual malice requirement. The enhanced negligence standard is superior to both standards because it increases employer protection without subjecting the employee to the rigors of proving knowing or reckless disregard for the truth. Instead, the employee must demonstrate the employer's failure to exercise reasonable professional care by clear and convincing proof. While more exacting than ordinary negligence, the enhanced liability standard does not approach the difficulty of demonstrating actual malice. The constitutional definition of negligence creates a middle ground that protects the employer from the chilling effects of strict liability while concurrently relieving the employee of the travails of the privilege system.

Despite ample reasons to replace the antiquated privilege system with a negligence standard of liability, *Stuempges v. Parke Davis & Co.*[141] demonstrated one potential drawback to this proposed reform. In *Stuempges,* the employer gave a reasonable, though highly opinionated

139. Dennis v. United States, 341 U.S. 494, 503 (1951) (although free discourse inherently is valuable, occasionally it is subordinate to other societal values).

140. Watkins & Schwartz, *supra* note 11, at 879-83.

141. 297 N.W.2d 252 (Minn. 1980).

and unenthusiastic, reference for the employee plaintiff.[142] In a subsequent defamation action, the plaintiff defeated the employer's privilege pursuant to the common-law definition of malice. The court reasoned that it was "important to protect the job seeker from malicious undercutting by a former employer. In this context the state of mind of the utterer of the alleged defamation is more significant than whether he knew that what he was saying was false."[143]

Under a negligence standard of liability, however, the employer in *Stuempges* could have escaped liability since motive and intent are absent from a due care analysis. To ensure adequate protection of the employee, the *Stuempges* court rejected the negligence standard of liability and concluded that the common-law malice requirement should be applied in employment defamation cases.[144]

This conclusion, however, can be rebutted. First, since bias in favor of defamation plaintiffs frequently influences the jury's determination of fault,[145] common-law malice is a poor indicator of the defendant's intent to defame. In other words, the common-law malice requirement is highly susceptible to mistake and jury bias, given that juries tend to equate false statements with the speaker's intent.[146] While this also may be true with a negligence standard, the Anderson definition resolves some of the dangers of unsubstantiated jury determinations regarding negligence. The clear and convincing evidence test and independent appellate review of the jury verdict insure that the plaintiff establishes a compelling case of lack of due care, and that the jury is not merely equating the false statement with the failure of the speaker to act reasonably.

Second, the *Stuempges* court failed to recognize that an employer's dislike of an employee does not necessarily color the employer's speech. In other words, there may be a tendency for juries to equate animosity between the employer and the employee with the speech at issue when, in fact, the employer's personal feelings about the employee are unrelated to the decision to dismiss that employee. Again, the common-law malice requirement unjustly skews verdicts in favor of the plaintiff. Any evidence of personality conflict between the employee and the employer becomes evidence of improper motive to terminate regardless of the actual

142. *Id.* at 255.

143. *Id.* at 258.

144. *Id.*

145. *See* sources cited *supra* note 13 (demonstrating jury bias); *see also* Franklin, *Declaratory Judgment, supra* note 12, at 823 (A "negligence standard brings strict liability back into the libel area through the back door because it is simply too easy for plaintiffs to prove. It is a small jump from finding an error to concluding that someone in the operation behaved unreasonably. . . .").

146. Bezanson, *supra* note 11, at 230-32; Franklin, *Declaratory Judgment, supra* note 12, at 823.

nexus between the dismissal and the employer's attitude towards that employee.

Finally, the negligence standard potentially covers speech motivated by ill will in that it is unreasonable for an employer to give a bad reference or to state a false reason for termination based on personal feelings. Thus, the negligence standard of liability could subsume the common-law malice requirement.

In conclusion, adoption of a negligence standard of liability would extinguish the need for the qualified privilege system. It would simplify and unify defamation law by eliminating the problems that have resulted from multiple definitions of malice. Lost protection under the qualified privilege, however, may further inhibit free expression. Adoption of Anderson's constitutional definition of negligence—which tailors ordinary negligence to professional conduct and requires procedural safeguards that insure the sufficiency of the evidence and the integrity of the jury verdicts—provides the optimal alternative in a defamation case for both the employers and employees.

While the Anderson model enhances the employer's first amendment protections, it may foreclose recovery when an employee is legitimately defamed. The defamed employee who cannot prove the requisite level of fault would be denied a remedy no matter how severe the injury to reputation or livelihood.[147] The following section of this Note reviews remedies available to defamation plaintiffs to assess how this gap might be filled and recommends the elimination of punitive damages and the establishment of a declaratory relief option to provide redress for plaintiff's who may be denied recovery under the Anderson model.

IV. Reforming Remedies: Eliminating Punitive Damages and Providing a Declaratory Relief Alternative in Employer Defamation Cases

A. Eliminating Punitive Damages

The attractiveness of high damage awards is a motivating force behind many defamation suits.[148] As Professor Franklin concludes,

147. *See* R. SMOLLA, *supra* note 1, at 3-13 to 3-14 (discussing why a negligence standard would be a substantial impediment to defamation victims).

148. Recent studies by the Libel Defense Resource Center (LDRC), a New York based information clearinghouse organized by media groups to monitor developments in libel law, reveal a tremendous increase in the amount of damages awarded, though many were later reduced or reversed on appeal. LDRC Bull. No. 7, July 15, 1983, at 5; LDRC Bull. No. 4, Oct. 15, 1982, at 3-4; *see also* Smolla, *Author Beware, supra* note 45, at 1-10 (describing the "dramatic proliferation of highly publicized libel actions" and the "reinvigoration of the modern law of defamation"). *But see* Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217, 220 (1985) (study demonstrating that some defamation plaintiffs only wish to clear their names).

"[L]ibel law, particularly media libel law, has developed into a high-stakes game that serves the purposes of neither the parties nor the public."[149] Since the *Gertz* decision, juries have tended to award higher damages due to the emphasis on fault.[150] Studies have shown that libel juries no longer merely provide compensation to the victim, but "are imposing punishment for the defendant's irresponsible conduct" in the form of high damage awards.[151]

Furthermore, the media has sensationalized high jury verdicts,[152] indicating to prospective jurors that these exorbitant figures have "some meaningful relation to damage deserving recompense. It is no wonder that seven-figure libel verdicts are now almost the norm, and eight-figure verdicts are not uncommon."[153]

Juries and the press are not the sole causes of high verdicts, as defamation itself has a built-in system that fosters abuse regarding damages. The three components of this system are: (1) presumed actual damages in private defamation cases;[154] (2) excessive and unwarranted punitive awards;[155] and (3) the lack of an alternative remedy to divert damage litigation and satisfy the plaintiff.[156]

149. Franklin, *Declaratory Judgment, supra* note 12, at 810.

150. Barrett, *supra* note 12, at 856.

151. *Id.*

152. Most press descriptions of libel suits include the *ad damnum* amount. *See, e.g., CBS Hit with $100-Million Suit over News Story,* BROADCASTING, Mar. 10, 1986, at 73; *Ex-Agent Files $120 Million Libel Suit Against Publisher,* PUBLISHER'S WEEKLY, Nov. 13, 1981, at 11; Taylor, *Cost of Libel Suits Prompts Calls to Alter System,* N.Y. Times, Feb. 25, 1985, at A11, col. 1 (reference to Westmoreland's "$120 million suit" against CBS).

153. Barrett, *supra* note 12, at 856-57 (showing that there were 11 verdicts in excess of $1 million between 1982 and 1984) (citing LDRC Bull. No. 11, Nov. 15, 1984, at 15).

154. As noted in Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974):

> The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.

See also Franklin, *Good Names, supra* note 13, at 11 ("In no other area of tort law does the jury lack guidelines in determining damages.").

155. *See* Barrett, *supra* note 12, at 851 (advocating elimination of punitive awards); Ingber, *supra* note 9, at 834 (punitive damages result in overdeterrence). Other authorities recommending abolition of punitive awards include: Franklin, *Good Names, supra* note 13, at 39 n.172; Smolla, *Author Beware, supra* note 45, at 91-92; Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution,"* 25 WM. & MARY L. REV. 793, 803-09 (1984); *see also* Wheeler v. Green, 286 Or. 99, 119, 593 P.2d 777, 789 (1979) (punitive damages in defamation cases found to violate state constitution's protection for freedom of expression).

156. *See* Barrett, *supra* note 12, at 848-49 (advocating declaratory judgment as an alternative to damage actions in defamation cases); Franklin, *Declaratory Judgment, supra* note 12, at 809-12 (same).

A brief background of defamation remedies places the above problems in perspective. Recoverable damages in a defamation action include: compensatory or actual damages,[157] punitive or exemplary damages,[158] and nominal damages.[159]

Courts allowed plaintiffs to recover presumed actual damages under common-law defamation actions, in lieu of proving actual damages.[160] *Gertz v. Robert Welch, Inc.,* however, held that presumed actual damages were inconsistent with first amendment principles.[161] The Court barred presumed damages absent a showing of actual malice.[162] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* restricted the *Gertz* holding regarding damages to statements of general or public concern.[163] As a result, private plaintiffs need not meet the *Gertz* standard of actual malice to recover presumed damages unless the statement is of general or public concern.[164] Actual damages are presumed when the statement concerns private affairs.[165]

Although presumed damages increases the potential for recovery absent injury, they are justified in the employer defamation case given the difficulty of proving injury to one's reputation.[166] There is no practical way to measure damage to professional standing, loss of advantageous

157. Compensatory damages are either general or special damages. General damages are those damages that are common or usual when a person is defamed, including all forms of compensatory damages other than pecuniary loss. RESTATEMENT (SECOND) OF TORTS § 621 comment a (1977). General damages encompass actual damages, or those damages supported by evidence. *Gertz,* 418 U.S. at 350. General damages also include presumed damages, or those damages presumptively in existence as a matter of law. These damages are awarded without any proof that the defendant has been injured. Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579, 581-82 (5th Cir. 1967), *cert. denied,* 393 U.S. 825 (1968).

General damages are presumed in libel and slander per se. KEETON, *supra* note 9, at 843. Slander, or a spoken falsehood, usually requires a showing of special, or out-of-pocket damages to recover. Slander per se provides exceptions to this general rule when the statement: (1) imputes criminal behavior to the plaintiff; (2) accuses the plaintiff of having a loathsome disease; (3) adversely reflects on the plaintiff's business or professional reputation; or (4) accuses the plaintiff of sexual misconduct. *Id.* at 788. Libel, or written falsehood, usually does not require a showing of special damages. When the libel requires extrinsic evidence to perceive the defamation, however, special damages are necessary. This type of libel is called libel per quod. *Id.*

Special damages are those damages that are proximately caused by the defamation. *Id.* at 844. Special damages would include out-of-pocket losses, such as lost wages or medical bills. Lind v. O'Reilly, 636 P.2d 1319, 1321 (Colo. Ct. App. 1981); RESTATEMENT (SECOND) OF TORTS § 575 comment b (1977).

158. KEETON, *supra* note 9, at 842.

159. *Id.* at 854, 860.

160. *Id.* at 843.

161. *Gertz,* 418 U.S. at 349.

162. *Id.*

163. Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985).

164. *Id.*

165. *Id.*

166. *See id.* at 760.

relationships, or pride.[167] The jury's function in determining the amount of presumed damages that adequately compensates the plaintiff for loss of reputation is invaluable. Juries should be able to reasonably estimate the presumed damage award by drawing upon their own life experiences and evaluating the facts of the case.[168]

Punitive damages, however, cannot be justified by the same rationale because they are awarded when the defendant publishes with an improper motive, or with knowledge of or reckless disregard for the truth of the statement.[169] Thus, punitive awards do not fall within the legitimate state interest of protecting individuals from, and compensating them for, injury caused by careless or malicious speech.[170] Admittedly, the state does have an interest in deterring false or malicious statements, but this interest is far outweighed by the need to prevent censored expression.

Balancing the state interest in deterring false speech through the use of punitive damages against the national commitment to free speech favors elimination of punitive damages for three reasons. First, juries have broad discretion in awarding presumed damages. Thus, the state's deterrent function can be maintained to some extent without resorting to punitive damage awards.[171] Large presumed damage awards provide incentive to speak with reasonable care.

Second, punitive awards increase the possibility of enormous, unregulated damage judgments that threaten free expression.[172] Punitive dam-

167. KEETON, *supra* note 9, at 843.

168. Shauer, *The Role of the People in First Amendment Theory,* 74 CALIF. L. REV. 761 (1986). Shauer reevaluates current distrust of juries in defamation cases and asserts that blind acceptance of the idea that jury verdicts represent "tyranny of the majority" is overreactive. *Id.* at 768-69. Shauer contends that "by removing majorities from any meaningful input into the consideration of free speech issues, we run the risk that those majorities will cease to see free speech as something they ought to care about." *Id.* at 783. Thus, Shauer asserts that "we ought to pay more attention to juries and majorities" and their assessments of what speech should or should not be protected. *Id.*

169. *See, e.g.,* Burnett v. National Enquirer, Inc., 144 Cal. App. 3d 991, 1008, 193 Cal. Rptr. 206, 216-17 (1983) (punitive damages decided on common-law malice of evil motive); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 74-75, 155 Cal. Rptr. 29, 36-37, *cert. denied,* 444 U.S. 984 (1979) (punitive damages decided on actual malice standard), *disapproved on procedural grounds,* McCoy v. Hearst Corp., 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986) (court disapproved of *Bindrim*'s suggestion that an appellate court's duty to examine the record in a public official defamation case did not involve a de novo review of the actual malice determination).

170. *Dun & Bradstreet,* 472 U.S. at 799 (Brennan, J., dissenting) ("Punitive damages in particular [are] '*wholly irrelevant* to the state interest' because '[t]hey are not compensation for injury.' ") (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (Harlan, J., concurring)) (emphasis in original).

171. *See Gertz,* 418 U.S. at 349.

172. *See supra* notes 148-53 and accompanying text. The typical damage award is now in the millions of dollars. LDRC Bull. No. 7, July 15, 1983, at 58. Another study showed that 30 out of 47 defamation awards included punitive damages, and 7 of those punitive awards were for $1 million or more. LDRC Bull. No. 4, Oct. 15, 1982, at 3, 5, tables 2, 2-B at 6. More

ages are more likely to contribute to excessive awards because unlike presumed damages, which are related to the perceived loss, punitive damages lack an adequate measuring standard. Thus, there is little guidance to aid juries in determining punitive awards.[173]

Moreover, because punitive awards are unrelated to compensating the plaintiff, they are subject to greater abuse. In determining the size of punitive awards, juries are likely to be influenced by their outrage at the content of the speech, rather than the motive of the speaker. This tends to make unpopular speech subject to higher judgments.[174] Thus, punitive awards will tend to punish the type of expression rather than the defendant. For example, a mistaken reference may be neither intentional nor motivated by ill will. The jury's outrage at the employee's misfortune, however, may color their finding of malice. Thus, an employer may be punished for his speech rather than for any intent to harm the employee.

Finally, jury determination of punitive awards is complicated by the need to define and apply the correct standard of malice. As previously stated, juries sympathize with defamation plaintiffs[175] in awarding punitive damages, and tend to find scienter when none exists.[176] The jury's tendency to equate false statements with the intent or malice of the speaker augments the probability of unreasonably high punitive awards. Increased punitive damages pose a serious threat to workplace communications given that the plaintiff already has been compensated, perhaps generously, under the presumed damage category.[177] Furthermore, the punitive damage award is generally uninsurable,[178] thus enhancing the plaintiff's settlement advantage and threatening to put an employer of modest means out of business.

In sum, punitive damages should be eliminated in private defamation actions due to the lack of a legitimate state interest in awarding punitive damage awards; the notion that plaintiffs already are compensated adequately under the presumed category; the chilling effect of potentially large punitive awards; and the tendency of juries to equate the false statement with malice, thus increasing the probability for abusive use of punitive damages.

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recent LDRC reports indicate that punitive damages are averaging $8 million per award. LDRC Special Alert, July 29, 1983, at 1.

173. *See Dun & Bradstreet,* 472 U.S. at 779.

174. *See supra* notes 151-53 and accompanying text.

175. *See* sources cited *supra* note 13.

176. *See* sources cited *supra* note 145.

177. *See* Wheeler v. Green, 286 Or. 99, 119, 593 P.2d 777, 789 (1979) (Underscoring the court's disallowance of punitive damages is the idea that the plaintiff already receives compensation under the presumed category. The additional punitive damages do not enhance compensation but do stifle free speech.).

178. Barrett, *supra* note 12, at 858-60.

B. Declaratory Relief as an Alternative Remedy in Defamation Cases

While some plaintiffs desire monetary relief, others want only a chance to vindicate their reputations.[179] In these cases, declaratory relief is an effective alternative to damages. Professors Barrett and Franklin both contend that legislative adoption of a declaratory judgment remedy provides one solution to the libel crisis.[180] The remainder of this section briefly reviews their proposals and summarizes how the declaratory relief alternative would work in employer defamation actions.

The professors' proposals share common features. A declaratory relief provision would allow either plaintiff or defendant to initiate an action in which the defendant's state of mind is not at issue.[181] In essence, the declaratory judgment would focus on the falsity requirement without having to prove or disprove intent.[182] Both proposals would preclude the plaintiff from recovering damages or asserting any other claim arising out of the same statement once the declaratory action is filed.[183] Finally, the declaratory relief rule would provide for fee shifting whereby the losing party in the action would pay the winner's attorney's fees.[184]

These features of the declaratory relief provision make it a useful remedy in the employer defamation scenario. As previously stated, adoption of either an ordinary tort negligence or Anderson's constitutional definition of negligence forecloses relief to the employee who is injured by the employer's false statement but cannot establish the requisite fault.[185] Declaratory relief enables the employee to obtain a favorable judgment in order to clear his name without having to establish the employer's fault—which can be time consuming and difficult to prove. Thus, elimination of the fault requirement can save the employee time and money. Furthermore, the attorney's fees provision "make[s] the declaratory judgment a feasible remedy for plaintiffs who are not wealthy."[186]

From the employer's perspective, the declaratory judgment insures that a suit for money damages will not be initiated once the declaratory action is filed. Damage actions will become less threatening as declaratory relief becomes an efficient and popular alternative. In addition, the employer's ability to initiate the declaratory action will discourage frivo-

179. *See* Soloski, *supra* note 148, at 220 (summary of an Iowa study of 164 libel plaintiffs).

180. Barrett, *supra* note 12, at 847; Franklin, *Declaratory Judgment, supra* note 12, at 810.

181. Barrett, *supra* note 12, at 849; Franklin, *Declaratory Judgment, supra* note 12, at 812.

182. Barrett, *supra* note 12, at 855-56; Franklin, *Declaratory Judgment, supra* note 12, at 815-16.

183. Barrett, *supra* note 12, at 851; Franklin, *Declaratory Judgment, supra* note 12, at 832-35.

184. Barrett, *supra* note 12, at 850-51; Franklin, *Declaratory Judgment, supra* note 12, at 832-35.

185. *See supra* notes 141-47 and accompanying text.

186. Barrett, *supra* note 12, at 851.

lous suits.[187] Meritless claimants will end up with large attorney's fees based on the fee shifting provision. Finally, forced settlements will be less threatening to employers. The employer of modest means will not feel compelled to settle for fear of expensive litigation. If the employee fails to establish the falsity of the statement, the employer can initiate the declaratory action, thereby avoiding the settlement and obtaining reimbursement for fees.[188]

Although the provision foreclosing a suit for money damages when the employer files for a declaratory judgment limits frivolous suits, it also poses problems. Should the court rule against the employer, the employee would be precluded from initiating a suit for money damages even if the employee can demonstrate the requisite fault. Thus, declaratory relief may become a method for employers to avoid financial liability.

One remedy for this problem would be to limit the rule precluding subsequent lawsuits to the plaintiff. Thus, further litigation against the employer would be barred only if the employee brings the declaratory action. Another option would be to allow a second suit for damages only if the employee could demonstrate a substantial likelihood of fault on the part of the employer. Neither option would be available to the employee who lost the declaratory judgment since the element of falsity would be lacking in the defamation action. With these modifications, declaratory relief provides an efficient and attractive alternative to damage awards and promises to decrease the threat of frivolous suits and excessive damage awards.

Approaching employer defamation cases from a damage perspective could prove to be as effective as reforming liability requirements.[189] Fewer sensational damage awards will diminish the threat to the employer that currently is posed by defamation suits. Decreasing fear of litigation costs and high damage awards will curb reactionary measures to the defamation trend, such as no reference policies. Elimination of punitive awards will reduce the stakes for defamation plaintiffs as well. Thus, plaintiffs will have less incentive to litigate claims on the basis of windfall damage judgments.

Declaratory relief provides an alternative remedy for employees who are more concerned with clearing their name than with obtaining large damage awards. It also provides an effective remedy for those who want to avoid more costly litigation that requires a demonstration of fault, and for those who cannot establish the requisite fault but nevertheless have been defamed. Increasing popularity of declaratory judgment as a

187. Franklin, *Declaratory Judgment, supra* note 12, at 814-15.

188. Barrett, *supra* note 12, at 859-60.

189. *See* Ingber, *supra* note 9, at 825-32 (suggesting that attempts to reduce the chilling effect of defamation by altering liability requirements have failed miserably and that approaching the problem by reforming remedies poses a superior option).

method of resolving employer defamation disputes will de-emphasize large damage awards and costly litigation associated with defamation. The ultimate effect of reducing damage litigation will be to mitigate employer fear and to re-open workplace communications.

Conclusion

Fear of liability has caused many employers to refrain from giving references or reasons for terminating employees. Increasing defamation litigation aggravates employer fear and unnecessarily chills work-related speech. Inadequacies in employer protection under constitutional and tort law, unrestricted punitive awards, and the lack of a declaratory relief alternative all exacerbate the threat to free expression in the workplace.

To remedy these inadequacies, in employer defamation cases an enhanced definition of negligence should be applied, the qualified privilege and punitive damages should be eliminated, and declaratory relief statutes should be adopted. An enhanced or constitutional definition of negligence would require courts to evaluate negligence according to the standards of the professional community rather than the ordinary person. The enhanced negligence standard also would require plaintiffs to prove negligence by clear and convincing evidence and would allow for independent review of jury verdicts.

Adoption of an enhanced negligence standard in all employer defamation cases would reduce employer fear of strict liability, create a uniform standard upon which employers could pattern their speech and conduct, and insure that liability was established clearly through the use of the higher degree of proof and independent review procedures. Replacement of the qualified privilege system with the enhanced negligence standard also would benefit employees by eliminating the more stringent malice requirement.

Elimination of punitive awards would decrease the threat of immense and uninsurable damage judgments while the adoption of declaratory relief statutes would provide an efficient and less costly method of resolving defamation disputes. Finally, declaratory relief resolves some of the inequities of a negligence standard by providing relief for employees who cannot prove the requisite fault.

The above proposals suggest several ways to curb the fear engendered by the employer defamation trend. The proposals provide unified and simplified rules that strive to balance the separate interests of employers and employees. The result will be to decrease the fear of liability that has stifled employer references and has inhibited free expression in the workplace.